

NOT DESIGNATED FOR PUBLICATION
DIVISION II

ARKANSAS COURT OF APPEALS
SAM BIRD, JUDGE

CA06-659

FEBRUARY 21, 2007

RANDY E. LEWIS

APPELLANT

V.

APPEAL FROM THE WORKERS'
COMPENSATION COMMISSION,
[NOS. F109650 & F412000]

AUTO PARTS & TIRE COMPANYd/b/a
FLITELINE MOTORS, INCORPORATED,
ZENITH INSURANCE COMPANY,
SECOND INJURY FUND AND DEATH &
PERMANENT DISABILITY TRUST FUND
APPELLEES

REVERSED AND REMANDED

Appellant Randy Lewis appeals a decision of the Arkansas Workers' Compensation Commission upholding the constitutionality of Arkansas Code Annotated section 11-9-522(f) (Repl. 2002). Mr. Lewis argues that this statute is in violation of the Equal Protection Clause of the United States Constitution and Article 2, Section 3 of the Arkansas Constitution. We hold that the statute is unconstitutional and reverse.

The facts are undisputed. Mr. Lewis suffered compensable injuries while working for his employer, Fliteline Motors. At the time of the injuries he was forty years old. Appellee Second Injury Fund (the "Fund") accepted liability for payment of permanent total disability benefits until Mr. Lewis turned sixty-five. In the hearing before the Administrative Law Judge ("ALJ"), the Fund asserted that it was not liable for benefits thereafter pursuant to Ark. Code Ann. § 11-9-522(f)(1) (Repl. 2002), which states in relevant part that "[p]ermanent

total disability benefits shall be paid during the period of permanent total disability until the employee reaches the age of sixty-five (65).” Mr. Lewis contended that this statute was unconstitutional.

On June 21, 2005, the ALJ found that Mr. Lewis “failed to prove by a preponderance of the evidence that Ark. Code Ann. § 11-9-522(f)(1) is unconstitutional due to his failure to notify the Attorney General’s Office pursuant to A.C.A. § 16-111-106(b).” Mr. Lewis appealed the ALJ’s finding to the Commission. Before he submitted his brief to the Commission, Mr. Lewis filed a motion to notice the Attorney General of the challenge to the statute. On October 4, 2005, the Commission issued an order holding that the motion was moot because the record reflected that the Attorney General had been provided notice pursuant to Ark. Code Ann. § 16-111-106(b) and that the Attorney General had declined to participate in the case. The Commission issued an opinion and order on April 13, 2006, affirming and adopting the ALJ’s decision, including the ALJ’s specific finding that Mr. Lewis “failed to prove by a preponderance of the evidence that Ark. Code Ann. § 11-9-522(f) is unconstitutional; therefore, the Second Injury Fund is liable for permanent total disability benefits until the claimant reaches age 65.” Mr. Lewis appealed the Commission’s decision.¹

Mr. Lewis’s sole point on appeal is that the Commission erred by failing to find Ark. Code Ann. § 11-9-522(f) unconstitutional. We agree with Mr. Lewis. In *Osborne v. Bekaert Corp.*, ___ Ark. App. ___, ___ S.W.3d ___ (Dec. 13, 2006), which presented a similar

¹We note that Mr. Lewis served a copy of his brief on the Attorney General, but the Attorney General did not participate in the appeal.

challenge to this statute, we held that it was an unconstitutional violation of the Equal Protection Clause of the United States Constitution. *Id.* We find no reason to revisit the issue, and we reverse the Commission's decision upholding the constitutionality of Ark. Code Ann. § 11-9-522(f).

Reversed and remanded.

GLADWIN and BAKER, JJ., agree.